Roure Bertrand Dupont, Inc. *and* **Angelo Sosa and Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract.** Case 22–CA–10137

30 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 28 December 1981 Administrative Law Judge Edwin H. Bennett issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that Shop Steward Angelo Sosa was discharged by the Respondent because he discussed with a newspaper reporter employee problems and the employees' reasons for striking the Respondent which resulted in a published newspaper article and because he engaged in strike misconduct.[1] The judge further found that Sosa's discharge represented a classic dual motivation case and that the Respondent met the burden set forth in our *Wright Line*[2] decision of proving that Sosa would have been discharged even in the absence of the protected conduct. The General Counsel filed exceptions to these findings alleging that the judge improperly found that in order to rebut the General Counsel's prima facie case—that Sosa's protected conduct was a motivating factor in his discharge—the Respondent had the burden to produce only a legitimate reason for the discharge and not the burden to persuade that Sosa would have been discharged even in the absence of the protected conduct. The General Counsel further alleges that if the proper *Wright Line* burden had been placed on the Respondent the Respondent would have failed to rebut the prima facie case. We find merit to the General Counsel's exceptions and reverse the judge's *Wright Line* analysis. We nevertheless find that in the circumstances of this case where Sosa engaged in a deliberate act of violence prior to his discharge that the purposes and the policies of the Act would not be furthered in awarding Sosa our traditional remedy of reinstatement and backpay.

In *Wright Line* the Board articulated a formula for determining causation in all cases alleging a violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation where an employer has both permissible and impermissible reasons under the Act for its action. We held that first the General Counsel had to "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089 (footnote omitted). We have held that the burden shifted to an employer under *Wright Line* is one of persuasion, an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. If an employer fails to satisfy its burden of persuasion, the General Counsel's prima facie case stands unrefuted and a violation of the Act may be found. See *Wright Line*, 251 NLRB at 1088 fn. 11; *Bronco Wine Co.*, 256 NLRB 53 (1981); *Rikal West, Inc.*, 266 NLRB 551 (1983). Cf. *Magnesium Casting Co.*, 259 NLRB 419 (1981).

Following the issuance of our *Wright Line* decision certain courts of appeals held that the burden shifted to an employer once the General Counsel's prima facie case is demonstrated is one of production, i.e., that an employer can rebut the General Counsel's prima facie case by simply producing evidence that a legitimate reason for the action existed.[3] The Supreme Court rejected that position however in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Thus it is now clear that in rebutting the General Counsel's prima facie case—that the protected conduct was a "motivating factor" in the employer's decision—an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.

In the instant case, both the Respondent's counsel and its vice president admitted that Sosa was

[1] We agree with the judge's findings that Sosa was engaged in protected concerted activities within the meaning of the National Labor Relations Act when he spoke to the newspaper reporter. Accordingly, we find no merit to the exceptions filed with respect to these findings. We further agree with the judge's unexcepted-to finding that Sosa engaged in unprotected misconduct during the strike.

[2] *Wright Line*, 251 NLRB 1083 (1980), modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] See for example *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981); *NLRB v. New York University Medical Center*, 702 F.2d 284 (2d Cir. 1983); *Behring International v. NLRB*, 675 F.2d 83 (3d Cir. 1982).

discharged for the protected conduct of talking to the reporter and for the unprotected conduct of engaging in strike misconduct. Indeed, Respondent Vice President Charles O'Connell admitted that Sosa's discussion with the reporter and the subsequent newspaper article thereon "was a motivating factor for his discharge." Accordingly, since we have affirmed the judge's findings that Sosa's actions with the reporter were protected[4] we find that the General Counsel has presented a prima facie case to support the allegation that Sosa's discharge on 7 July violated Section 8(a)(1) and (3) of the Act.

We further find contrary to the findings of the judge that the Respondent has failed to demonstrate that it would have taken the same action against Sosa in the absence of his engaging in protected activity.[5] A careful review of the record reveals that the Respondent made no distinction between the reasons it stated for Sosa's discharge. Thus the Respondent relied on the theory that in rebutting the General Counsel's prima facie case an employer merely has to produce a permissible reason for its action and admitted in its opening statement at the hearing and in its testimony that both the strike misconduct and Sosa's actions with the reporter caused Sosa's discharge. The Respondent did not present any evidence demonstrating that the strike misconduct weighed more heavily in the determination to discharge Sosa than Sosa's actions with the reporter. We are left instead with an admission by the Respondent's official responsible for the discharge that he considered and relied on activities by Sosa that we have found to be protected in arriving at the decision to discharge Sosa and no evidence that the Respondent would have taken the same action against Sosa in the absence of such protected activity. In this connection, the judge nevertheless found that no violation occurred because the Respondent produced a permissible reason for the action. However as we explained above that analysis has been rejected by the Supreme Court. Consequently we find that in the circumstances of this case the Respondent has failed to satisfy its burden under *Wright Line* and therefore its discharge of Sosa violated Section 8(a)(1) and (3) of the Act.

[4] See fn. 1, supra.

[5] Member Hunter agrees with the finding herein, on the grounds that the Respondent has admitted to two reasons for Sosa's discharge—one lawful and one unlawful—and has failed to show that either reason was sufficient by itself.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Angelo Sosa on 7 July 1980, the Respondent interfered with, restrained, and coerced him in the exercise of rights guaranteed him by Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent violated Section 8(a)(1) and (3) of the Act we shall order it to cease and desist therefrom. Although we have found that the Respondent unlawfully discharged Angelo Sosa, we will not order the Respondent to reinstate Sosa or provide him with backpay. We have long held that when an employee engages in serious strike misconduct he loses the protection of the Act.[6] We have recently reaffirmed this established tenet of law in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), where we noted in part that the Act does not protect strikers who engage in acts of coercion, intimidation, and violence. We have further denied employees who were discriminatorily discharged the Act's traditional remedies when they engage in acts of serious misconduct which renders them unfit for future service with their employers.[7] In the instant case, the judge found that Sosa engaged in "an act of deliberate violence" by admittedly throwing nails at a truck driven by an employee of a different employer and that Sosa's actions were "calculated to create an immediate and potentially dangerous driving condition." The judge further found that Sosa's act of throwing nails "was a deliberate and unprovoked act of violence having the potential for serious harm to persons" and that it caused flat tires in the truck and in other cars. We do not believe that in the circumstances of this case the purposes and policies of the Act will be furthered by awarding reinstatement

[6] See for example *Borman's Inc.*, 199 NLRB 1250 (1972); *Otsego Ski Club*, 217 NLRB 408 (1975), modified 542 F.2d 18 (6th Cir. 1976); *Moore Business Forms*, 224 NLRB 393 (1976), modified 574 F.2d 835 (5th Cir. 1978).

[7] See for example *Hillside Avenue Pharmacy*, 265 NLRB 1613 (1982); *C. K. Smith & Co.*, 227 NLRB 1061, 1075 (1977); *Fairview Nursing Home*, 202 NLRB 318, 325 fn. 36 (1973).

and backpay to an employee who prior to his discharge purposefully disregards the safety of employees and nonemployees and intentionally attempts to injure them and the public at large.

ORDER

The National Labor Relations Board orders that the Respondent, Roure Bertrand Dupont, Inc., Teaneck, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging protected concerted activities of its employees by discharging them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Post at its Teaneck, New Jersey facility copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage or in any way interfere with our employees' exercise of their Section 7 rights by discharging them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ROURE BERTRAND DUPONT, INC.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. The hearing on this matter was conducted on May 29, 1981, in Newark, New Jersey, on a complaint issued by the Regional Director for Region 22 on October 28, 1980. The charge initiating this matter was filed on July 8, 1980, by Angelo Sosa, an individual, alleging that he was unlawfully discharged by Roure Bertrand Dupont, Inc., herein Respondent. The complaint raises the following issues. Did Sosa engage in protected activity when he made certain statements about Respondent to a newspaper reporter during the course of an economic strike which remarks subsequently were published, although not verbatim, in the newspaper? Was Sosa's discharge for such conduct and for engaging in picket line activity, conceded by the General Counsel although not by the Charging Party, to be unprotected, lawful under the Act? Respondent contends that Sosa's conduct, in all respects, was outside the ambit of the Act's protection but that, even if his newspaper interview protected by the Act, Respondent was free to discharge him for picket line misconduct.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New Jersey corporation with its principal office and place of business at 1775 Windsor Road, Teaneck, New Jersey. It is engaged at the facility in the manufacture, sale, and distribution of perfumes, fragrances, and related products. It annually sells and ships in excess of $50,000 of such products in interstate commerce directly to customers located outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 815 or the Union), has been party to a series of collective-bargaining agreements with Respondent. The complaint alleges, Respondent admits, and I find that Local 815 is a labor

organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Protected Activity*

Local 815 represents a unit of approximately 44 production and maintenance employees who have been covered by a series of successive 3-year collective-bargaining agreements since 1972. The most recent of these agreements expired on May 24, 1980.[1] Negotiations for a new agreement were unsuccessful and on May 25 of that year the Union commenced picketing the plant with "on strike" signs.[2]

On May 28, a reporter for a local newspaper, the Bergen Record, appeared at the picket line for purposes of obtaining a story regarding the strike. He was referred by some pickets to Sosa as the shop steward and the one in charge. According to Sosa's unrefuted and credited testimony the reporter questioned him concerning the reason for the strike. Sosa replied that the employees were seeking higher wages but also they were angry because they thought the strike was unnecessary. Sosa expressed the belief that the contract could have been resolved had Respondent not broken off negotiations at the last session on May 22. During the interview the reporter also asked Sosa what other "problems" the employees had at work to which he replied that they had experienced difficulties with fumes, that indeed employees had "passed out from the fumes," and there had been problems between Respondent and the Union concerning the ventilation system with respect to the fumes. As Sosa explained to the reporter, it was problems such as these which justified the Union's wage demands.

On May 29, the reporter's article appeared in the Bergen Record under the heading "Money and odors at issue—Perfume plant workers strike." The article begins as follows: "Workers have thrown up picket lines outside a perfume factory where they complain the pay is low and the stench hurts their health." Sosa, who is identified as the union steward, is then quoted as stating: "When you come out of there at five o'clock, honestly, and I mean this sincerely, you're drunk." The article then proceeds to detail the parties' respective economic positions and attributes to Sosa an accusation that management was bargaining in bad faith. In addition, the article contains the following: "In addition to wage demands, Sosa said the Union wants a better ventilation system to syphon off chemical odors that he said cause dizziness. He said employees work without masks and that management discourages opening doors to prevent scents from wafting into homes. He said one worker had fainted from the fumes a year ago." The balance of the article sets forth Respondent's position on the strike issues and other material not germane to the issues in this case.

Both the General Counsel and Local 815 concede that at no time during the 1980 negotiations, nor indeed during any of the negotiation which led to the prior agreements, all of which Sosa participated in as steward and a member of the negotiating committees, did Local 815 raise any complaint about the ventilation system or seek to obtain contract language rectifying or in any way dealing with the problem of fumes, either as described by Sosa to the reporter or as it appeared in the newspaper article. Further, there is no record evidence that the Union ever raised specific grievances with Respondent claiming that the problems surrounding the fumes or the ventilation system breached any existing term of the collective-bargaining agreements. Nevertheless, there is ample record testimony that employees did experience problems in connection with the inhalation of fumes and what they perceived to be an inadequate air system to deal with the odors naturally produced in the course of the process of producing the fragrances and perfumes sold by Respondent.

Thus, Sosa credibly testified about the following employee complaints made to him in his capacity as shop steward in the fall of 1978 (late September/October). Employee Ron Scalla became ill as a result of inhaling the odors and fumes which are an incident of the chemicals and oils used in the production process. Scalla testified that he reported his illness to Sosa and even was taken to the hospital by Respondent's personnel manager, Margaret Palm. At the hospital, where he was treated and released, Scalla complained to the treating physican that he had been overcome by fumes. Palm testified that Scalla had not made any complaint to her, or any complaint of which she was aware, that the reason for his illnesses on that date was caused by inhaling fumes. Rather, she recalled Scalla's illnesses as attributable to a heart condition. Palm's testimony does not seriously impair the thrust of Scalla's testimony to the effect that he felt ill because of the inhaling of fumes and that he so advised Sosa and the doctor at the hospital where he was treated, a fact confirmed by the hospital record reflecting the complaint made by him that date to the treating physician. Nevertheless to the extent that Palm's testimony might be viewed as controverting that of either Scalla's or Sosa's I credit the testimony of the latter two which was mutually corroborative and supported by the hospital record. Further, according to Sosa he received complaints from time-to-time from almost every member of the bargaining unit during the period of his stewardship to the effect that the ventilation system was inadequate to deal with the fumes and odors.

That employees considered themselves, at the very least, discomforted by odors and fumes is made plain in the testimony of Ronald Goldman, a compliance officer for OSHA, and the records of that Federal agency reflecting that, on four occasions between July 1978 and March 1979, employee complaints were made concern-

[1] Unless otherwise stated, all dates hereinafter are in 1980.

[2] The parties are in disagreement whether Local 815 was locked out or whether it went on strike. A resolution of that issue is not material to this case but nevertheless the evidence discloses that Local 815 had threatened a strike prior to May 23. When the employees reported for work that day Respondent decided not to permit them to work, although they were paid for the day, because according to Charles O'Connell, vice president in charge of operations, Respondent feared damage might be done to its property on the last day of the agreement. The picket signs bore the legend that Local 815 was on strike and throughout the proceeding Sosa, who has been the only shop steward since 1972, referred to the employees as having been on strike. For convenience' sake the work stoppage is referred to herein as a strike.

ing the inhalation of fumes caused by the some 1400 chemicals which are used in the manufacture of the various fragrances. The OSHA inspections in each instance resulted in a finding that the chemicals and components of Respondent's products used in its plant did not violate any of the standards established by that agency, and did not justify a finding that such materials had a hazardous effect on the health of the employees. While these findings by OSHA exonerate Respondent concerning the use of hazardous materials within OSHA's definition of that term, this same evidence also demonstrates that there was a perception by employees, over some period of time, that they had a problem in this regard. Further, the OSHA report for the inspection made in November 1978 discloses that Respondent acknowledged a problem with the ventilation system and that it unsuccessfully had attempted to resolve it by contacting the contractor who had installed the system. Finally, the OSHA report for the March 1979 inspection also states in effect that the Union and Respondent were advised that, because OSHA had no standards, as such, relating to ventilation, problems in that area were best resolved through negotiations between the parties, and that a representative of Respondent stated that the Union would be consulted in an effort to ameliorate any discomfort which may have been caused by insufficient ventilation.

The record is clear that one of the employee complaints was made by Sosa and further that he was aware of the other complaints and the OSHA investigations conducted pursuant thereto. However, whether or not Sosa knew that OSHA, in each instance, had not found any violations of its standards is disputed. Respondent contends, and I agree, that Sosa, as union steward, knew or had to have known of these findings. According to Goldman, OSHA practice normally is to advise a bargaining representative of its findings and there is no indication that this was not done in each instance here. While Goldman and Sosa both credibly testified that Goldman conveyed this information directly to Sosa on only one such occasion, I find that Sosa is charged with the knowledge of OSHA's findings in each instance. It simply is not conceivable or probable that Sosa did not trouble himself to learn from other union officials the outcome of OSHA's investigations concerning what the Union itself believed to be a problem. Even if other union officials did not receive an official report from OSHA, I still would find that Sosa, the only union steward, and an active and concerned one at that, who clearly knew of the employee complaints to OSHA, learned of and knew that Respondent had not been found in violation of OSHA standards. Clearly, if the case had been otherwise, Sosa and the Union would have pursued the matter for remedy and Sosa would have used that information in his interview with the reporter.

Based on the foregoing, and the entire record, I also find, that although Respondent did not violate OSHA standards, employees and Sosa, individually and as a representative of the employees, believed in good faith and for good reason that their health was being adversely affected by employment in Respondent's plant. And that their belief was so founded notwithstanding such condition appears to be a normal incident to the employment condition.

B. *The Unprotected Activity*

On June 30, Sosa was picketing with a number of other employees on the public thoroughfare leading to the plant when a truck passed through the picket line and entered the plant area. The truck, which was driven by an employee of an independent trucking firm, was there to make a pickup of barrels containing the various fragrances. Sosa testified that the pickets became angry that their picket line had not been honored and they verbally expressed their anger in no uncertain terms to the driver. In addition, the pickets loudly voiced the wish that they had some nails so they might demonstrate their anger in a more concrete fashion. It appears this wish or desire was overheard by a stranger seated in a car parked in the vicinity of the picket line, for he drove away as soon as these expressions of anger were uttered. By mere coincidence the stranger returned to the picket line at precisely the same moment that the now loaded truck was leaving the plant area. Sosa candidly testified that the car bearing the stranger approached him with a hand holding a can of nails extended from the car. Sosa grabbed the can from the stranger and immediately flung its contents over his shoulder directly at the oncoming truck. The contents of the can, namely, numerous nails 2 inches in length, struck the cab of the truck and then scattered along the road and the grassy area alongside. The truck continued on its way without stopping, although subsequently the truck driver discovered a flat tire.

Michael Sweeny, a vice president of Respondent, observed Sosa's actions as just described although he did not see that the contents of the can consisted of nails. Sweeny reported his observations to Charles O'Connell, vice president of Respondent in charge of operations. According to the uncontradicted testimony of employee Ruben Sarraf, he discovered numerous nails at the entrance to the plant when he reported to work the next day (July 1) and he reported this to Merton Rawlins, the maintenance supervisor. Rawlins further testified that he then examined the road, and confirmed the presence of nails. During that morning he received complaints from about 10 employees that their cars had flat tires after arriving at work. Rawlins obtained the services of a garage and observed that such flats had been caused by nails. The inference is warranted that the tire damage to the truck and employees' cars was a result of the nails thrown by Sosa. I find further that Sosa's act of throwing nails directly at the moving truck was a deliberate and unprovoked act of violence having the potential for serious harm to persons.[3]

[3] The Charging Party's contention that Sosa justifiably was provoked is devoid of merit and is rejected. The Charging Party asserts Sosa was reacting to damage inflicted on his car. Merely to state the facts demonstrates the weakness of this claim. Assertedly, Sosa's car was damaged 2 weeks earlier while parked near his home 50 miles from the plant, by a person or persons unknown. That this could reasonably be viewed as provoking Sosa's conduct here in issue is, in my judgment, so extreme a position as to require no further discussion. Second, it is claimed Sosa

Continued

The strike ended on July 3, and employees were scheduled to return to work on July 7. Sosa, for personal reasons, did not return that date and on July 8 he received a letter from O'Connell dated July 7, stating, in pertinent part, "that you are hereby discharged effective immediately. The reasons for your discharge are that you were observed placing nails on Vesey Street, which resulted in a number of flat tires. In addition, you stated to a news reporter that it was unsafe to work in our plant due to the emission of odor, a charge you knew to be false." O'Connell also testified that these were the reasons for discharging Sosa and that, although he did not speak to the newspaper reporter, the article conveyed the impression that Sosa stated the plant was not a safe place in which to work. This charge, O'Connell testified, Sosa knew to be false because the Union at no time sought to correct the "unsafe" condition in bargaining, and Sosa knew that OSHA had cleared Respondent of such allegation.

Discussion and Analysis

The General Counsel concedes that Sosa's nail throwing conduct on June 30 was unprotected and that it could have subjected him to discharge. However, General Counsel argues that Sosa's interview with the news reporter, and the resulting publication, was protected conduct and that Respondent violated Section 8(a)(3) and (1) of the Act when admittedly it discharged him for that reason also. The General Counsel asserts the case is governed by the Board's decision in *Wright Line*,[4] and that, notwithstanding the unprotected activity engaged in by Sosa, he would not have been discharged but for his having engaged in the aforesaid protected activity.

It is argued that prima facie a violation has been proven in that Respondent had an unlawful motive in discharging Sosa as evidenced by the termination letter and O'Connell's testimony that one reason for the discharge was certain of Sosa's remarks during an interview with a newspaper reporter which, inter alia, dealt with the employees' concern over health and safety conditions of employment.[5] The General Counsel then argues that Respondent did not meet its burden of demonstrating that Sosa would have been discharged but for that protected activity.

Respondent argues that Sosa was discharged solely for justifiable reasons. Initially, Respondent contends that Sosa's statements to the reporter, as well as the picket line nail throwing, were outside the Act's protection. Further, Respondent contends that, even if the newspaper interview is construed as a form of protected activity, the discharge nevertheless was permissible because the other reason given, i.e., the nail throwing incident, was so clearly a legitimate one that Sosa would have been discharged for that alone.

We consider first the protected aspect of Sosa's activity, i.e., whether or not his interview to the newspaper reporter, and the resulting article, was a protected form of concerted activity? It is a settled proposition that Section 7 of the Act protects employees in the dissemination, distribution, and publication of material relating to terms and conditions of employment as such activity clearly is for their "mutual aid or protection" as that term of Section 7 is defined by the Supreme Court. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). However, the blanket of protection afforded to such public communications is dependent on a determination that they are "related to a legitimate, ongoing labor dispute between the employees and their employer, and where the communication [does] not constitute a disparagement or vilification of the employer's product or its reputation." *Allied Aviation Service of New Jersey*, 248 NLRB 229, 230 (1980), and cases cited therein. Further, in measuring whether or not the statements are related to a particular labor dispute we are cautioned by the Board to avoid a restrictive analysis; rather, "the touchstone [is] not whether the communication constituted a virtual carbon copy of the specific arguments raised with the [employer], but [is], rather, whether the communication was a part of and related to the ongoing labor dispute. (Id. at 231. Emphasis in original.)

Application of these principles to the statements in issue leads inescapably to the conclusion that Sosa's comments to the reporter, and the subsequent publication of those comments, constituted protected activity. His remarks dealt with the Union's view of the status of the negotiations, the reasons for the strike, and the working conditions of the employees. Respondent, however, argues that the protection of the Act is to be denied these statements because they were made with reckless disregard of the truth, they were false and malicious, and they were calculated to expose Respondent to public contempt as a company that was unconcerned with the safety of its workers. Respondent seeks to support its legal argument by relying on the fact that OSHA had investigated employee complaints concerning an alleged inadequate ventilation system and/or the hazardous nature of the fumes emitted by the products produced, and had concluded that in no respect had Respondent

merely was reacting to the truckdriver breaking the picket line, thereby affording a mantel of protection to Sosa by virtue of the "animal exuberance" theory. All of Respondent's cited authority in support of this argument are factually so wide of the mark as, again, not to require additional comment. Suffice to say there is no authority of which I am aware that excuses violent behavior by one employee directed against another employee because the latter peacefully exercises a Sec. 7 right. The Charging Party's argument switches the roles of victim and offender resulting in a perversion of law and logic.

[4] *Wright Line*, 251 NLRB 1083 (1980).

[5] The General Counsel also points to alleged conversations between Sosa on the one hand and two of Respondent's vice presidents on the other hand. According to Sosa, these vice presidents, James S. Bell and Robert Slattery, told him, in effect, within a few days after the newspaper article appeared, that Lindsay, Respondent's president, had said that he would get Sosa because Sosa had ruined his image in the newspaper article. Both Bell and Slattery categorically denied making such statements to Sosa. Even if true, these statements do not, in my judgment, contribute materially to the General Counsel's case. O'Connell's testimony and the dismissal letter itself leave no doubt that Respondent was motivated, at least in part, by Sosa's newspaper interview. These alleged statements merely are earlier state-of-mind reflections of Respondent's later conduct. Nevertheless, I cannot credit Sosa's unsupported testimony on this matter. Lindsay was not even shown to have played a role in the discharge, which the record indicates was O'Connell's decision. Nor is there a solid basis for believing Lindsay would have made such comments to two vice presidents, or that they would have so casually communicated them to Sosa.

violated any of the standards promulgated by OSHA. Respondent also points to the inaccurate comment in the article that a better ventilation system was a specific demand by the Union in bargaining. I reject these arguments and conclude that, to the extent they are factually supported by record evidence, they are legally insufficient.

The exercise of the statutory right to protest what the employees perceived to be an intolerable condition of employment, and the concomitant right to publicize the protest, does "not depend on the *manner* in which the employees choose to press the dispute, but rather on the *matter* that they are protesting," *Tamara Foods*, 258 NLRB 1307, 1308 (1981) (emphasis in original, citations omitted). Consequently, the absence of an OSHA violation or remedy for the employees' complaints is irrelevant to whether or not those complaints were made with malice or were deliberately false. The protection of Section 7 is not forfeited simply because there is no available avenue of redress, through another statutory scheme or otherwise, or because the protested working condition was not as objectionable, from the employer's point of view, as the employees perceived it to be. *Tamara Foods*, supra, and cases cited therein. "Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." Id. It is clear, and the record is overwhelming in this regard, that employees were troubled, and in some cases sickened, by the fumes emitted in the production process, and that Sosa's comments to the press did no more than accurately reflect these concerns. It might be another matter if Sosa had misrepresented to the press what OSHA had concluded, but here Sosa merely reported what he knew to be true, that employees had experienced discomfort and difficulty in the work place as a result of fumes created on the job, albeit these conditions may have been inherent in the very nature of the job itself. Indeed the record establishes that Respondent too had knowledge of this problem and advised OSHA it would seek to rectify it by contacting the contractor who installed the ventilation system, and through the collective-bargaining process. Under these circumstances it is unwarranted to conclude that Sosa acted maliciously and with reckless disregard of the truth.

Nor do Sosa's remarks fall within the ambit of product disparagement as set forth in the *Jefferson Standard* case[6] so as to be deprived of statutory protection for that reason. Respondent's argument here again rests on the strawman that Sosa's remarks were made maliciously and were knowingly false. Not only were his remarks not malicious, but they were as accurate as required to receive the protection of the Act. That his statements to the reporter concerning the basic health concern of employees was entirely accurate has been discussed above. That this basic concern had not been a subject of bargaining, as indicated in the article, and assuming that the article accurately reported the interview, is an insufficient basis on which to vitiate the statutory protection. While the article may not have been a mirror image of the bargaining, the entire substance of the article was sufficiently related to the labor dispute then in progress between the parties. *Allied Aviation Service*, supra. The single sentence in the article, that Sosa said the Union wanted a better ventilation system in addition to wage demands, is hardly a material misrepresentation of the bargaining in any event. That the Union had not made such a proposal at that stage of negotiations does not mean they did not want better ventilation. The linkage of that comment to the wage demands strengthens, not weakens, the finding that it was all part of the ongoing labor dispute. Moreover, Respondent may not rely on the substance of the newspaper article to the effect that the Union was seeking through bargaining to remedy the ventilation problem, inasmuch as this was not exactly what Sosa had told the reporter. Sosa's comments to the reporter were in response to the latter's question concerning what problems the employees had in the plant. It appears to have been the reporter's interpolation of the interview which resulted in the placing of these remarks into the bargaining context, and Respondent made no independent effort to confirm the reporter's article. Respondent has not sustained its burden of establishing that Sosa was maliciously motivated, that his comments were in reckless disregard of the truth, or that the statements (as made or as published) bore no relationship to the ongoing labor dispute. Accordingly, Sosa's comments to the reporter, and the publication of those comments, constituted protected activity. *NLRB v. Greyhound Lines*, 660 F.2d 354 (8th Cir. 1981), enfg. 251 NLRB 1638 (1980).

We next consider Sosa's picket line conduct on June 30, i.e., the throwing of a can of nails directly in the path of and against an oncoming truck. I already have concluded that this conduct cannot be excused merely on the assertion that it was provoked by some damage to Sosa's automobile 50 miles away from the plant 2 weeks earlier, as there simply is no reasonable causal relationship or linkage between this event and the labor dispute. The Board often has considered the type of picket line conduct which would disqualify strikers from the protection of the Act. In *Coronet Casuals, Inc.*, 207 NLRB 304 (1973), the rule is stated as follows:

> Thus, strikers have been deemed to lose the Act's protection when they seized the employer's property, or engaged in acts of "brutal violence" against a nonstriker. At the same time it is true that not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act. Thus, absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language, making abusive threats against nonstrikers, engaging in minor scuffles and disorderly arguments, momentarily blocking cars by mass picketing, and engaging in other minor incidents of misconduct [Id. at 304–305, citations omitted.]

[6] *NLRB v. Electrical Workers Local IBEW 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

Strewing nails at the entrance to a struck plant is the type of conduct that the Board traditionally has considered beyond the pale and of such a serious and grievous nature as to deprive employees who commit such conduct of the Act's protection. *Borman's, Inc.*, 199 NLRB 1250 (1972). See also *Otsego Ski Club*, 217 NLRB 408, 413 (1975). In *Moore Business Forms*, 224 NLRB 393, 398 (1976), the administrative law judge succinctly summarized the Board's view as follows: "Nail strewing is a common form of picket line harassment and has frequently been considered by the Board. Flattened tires present substantial inconvenience for those subjected to them. More importantly, however, such conduct tends to provoke violent outbursts at the picket line, and create driving hazards. The Board has consistently found that nail strewing is such serious misconduct that it justifies the discharge of strikers so engaged." In the instant matter Sosa not only placed nails in a position where they might cause flat tires, but in my judgment he also committed an act of deliberate violence against the truckdriver. To throw nails directly in the path of, and against, a moving truck reasonably is calculated to create an immediate and potentially dangerous driving condition. Accordingly, there is no question that Sosa committed conduct at the picket line which, under well established precedent, would have justified Respondent in refusing to return him to his job at the conclusion of the strike.

The aforesaid conclusion does not, however, terminate the inquiry, for Respondent admittedly expressed, and had, a second reason for the discharge of Sosa, and that is the protected activity in which he engaged.

Section 10(c) of the Act specifies that the Board shall dismiss unfair labor practices unless they are established by a preponderance of the evidence. Accordingly, the Board always has placed the burden of 8(a)(3) violations on the General Counsel. In *Stratford Lithographers*, 168 NLRB 469 (1967), affd. 423 F.2d 1219 (2d Cir. 1970), the Board upheld the Trial Examiner's finding of an 8(a)(3) violation, but expressly rejected the reasoning that Respondent failed to meet its burden of proof:

> The General Counsel established a *prima facie* case of violation, and, while the burden of going forward to show economic justification for the changes shifted to the Respondent, the ultimate burden of proof to establish unlawful discrimination remained with the General Counsel. [168 NLRB at 469 fn. 1.]

In *Wright Line*, supra, the Board articulated a formula for distributing burden of proof in 8(a)(3) cases. Once the General Counsel has made a prima facie case "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. The language used in *Wright Line* and many subsequent cases[7] appears to shift the burden of proof entirely to the employer once the General Counsel has proved, prima facie, that the discharge was partly unlawfully motivated. Despite this seeming suggestion regarding the burden of proof, the Board, in the cited cases, concluded simply that the employer had not met its burden of proving a legitimate business motive for discharge, in the face of the General Counsel's prima facie case. Significantly, in each of the cases the employer's defense was extremely weak. Although the Board decided the cases on the grounds that the employer did not overcome the General Counsel's prima facie showing, it is quite clear that none of the respondents even balanced the General Counsel's evidence. Thus, application of the *Wright Line* formula remains consistent with the proposition that ultimately burden of proof of the violation always rests with the General Counsel, a maxim reiterated in *Wright Line* itself.

> [T]his shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense . . . to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden. [251 NLRB at 1088 fn. 11.][8]

In a discharge case following *Wright Line*, the Board adopted the administrative law judge's finding the complaint was without merit because the General Counsel failed to meet his ultimate burden of proof:

> Once such *prima facie* case is established, the burden is shifted to the employer to demonstrate that the same action would have taken place in the absence of the protected conduct. This shifting of burdens does not shift ultimate burden to the General Counsel to establish an unfair labor practice by a preponderance of the evidence. [*Webb-Centric Construction*, 254 NLRB 1181, 1185 (1981). See also *Magnesium Casting Co.*, 259 NLRB 419 (1981).]

Cases following *Wright Line* have also indicated that the decision was intended to clarify the Board's existing approach to 8(a)(3) cases rather than to fundamentally change the law in this area.

"[T]he *Wright Line* decision clarified and articulated the analysis that should be used in cases turning on employer motivation. It did not set forth a completely new analysis." *Guerdon Industries*, 255 NLRB 610 fn. 2 (1981). Clearly, in light of the fact that the Board has

[7] See *Board of Trustees of City Hospital*, 254 NLRB 805 (1981). The Board sustained finding of discriminatory discharge on the grounds that respondent did not meet the General Counsel's prima facie case by "carry[ing] out its burden of showing that its action with respect to [the employee] would have been the same even in the absence of protected conduct." 254 NLRB at 805 fn. 2. See also *Doral Building Services*, 254 NLRB 105 (1981); *Doug Harley, Inc.*, 255 NLRB 800 (1981). *Golden Beverage of San Antonio*, 256 NLRB 469 (1981).

[8] In *Wright Line*, 251 NLRB at 1088, the Board cites *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), to buttress its argument that a shifting burden of proof is applicable in 8(a)(3) cases. Although the application of *Great Dane* to a dual motive discharge case is limited because it involved conduct inherently destructive of employee rights and thus did not focus on motive, it nevertheless lends support to the proposition that the employer is required to meet the General Counsel's prima facie case.

always held that the ultimate burden of proving a violation is on the General Counsel, shifting this burden to the employer would be a drastic departure from previous policy. See *Stratford Lithographers*, 168 NLRB at 469 fn. 1. Finally, courts of appeals have held that the burden of proving an 8(a)(3) violation ultimately rests with the General Counsel. In enforcing *Wright Line* the First Circuit emphasized at length that the ultimate burden of proof is on the General Counsel and that, in response to a prima facie case, the employer is confronted only with the burden of producing evidence, *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981). See also *T.R.W., Inc. v. NLRB*, 654 F.2d 307 (5th Cir. 1981) (employer not required to bear the burden of disproving an unlawful motivation).

The instant matter presents a classical *Wright Line* situation. Respondent had, and expressed, both a clearly legitimate reason for the discharge and a clearly impermissible one. We thus are presented with a mixed motive case in pristine form. The General Counsel does not dispute the existence of the illegitimate reason but asserts that, inasmuch as Respondent has failed to prove that it would have discharged Sosa for his unprotected conduct in the absence of the protected activity engaged in by him, the violation is established. However, this approach tends to ignore the General Counsel's ultimate obligation, as discussed above, to prove by a preponderance of the evidence that Respondent violated the Act. Clearly, Respondent responded to and met the General Counsel's prima facie showing, and has established its burden that it had a legitimate reason for discharging Sosa. The two competing reasons stand in stark contrast and although the other circumstances surrounding the discharge do not illuminate the issue with crystal clarity, I am unable to conclude that the General Counsel has met its burden that Respondent violated the Act.

Thus, there is no basis for finding that Respondent in any way condoned or excused Sosa's picket line misconduct, and there is no showing that Respondent in the past had excused similar conduct by other employees thereby subjecting Sosa to disparate treatment.[9] Further, there is no demonstrated animus towards the Union or towards employees for engaging in specific protected activity. This appears to have been the first time that the Union was required to strike for an agreement and there does not appear in this record any showing that the labor relations between the parties have been anything but amicable. There is no evidence that whatever grievances existed were not handled in a harmonious way and the various OSHA complaints at no time led to employee reprisals. Nor can the General Counsel take comfort in the timing of the discharge in relationship to the protected and unprotected activities. To the extent timing is a factor, it weighs against the General Counsel in that the triggering event more likely was the unprotected activity engaged in on June 30, almost immediately prior to the refusal to reinstate Sosa at the end of the strike. On the other hand, the article appeared in the newspaper on May 29, more than a month before the discharge, during which period of time Respondent, if it were so motivated, could have notified Sosa that disciplinary action would be taken against him for that article. Coupled with the paucity of evidence normally underlying a finding of discriminatory motive is the presence here of a clearly legitimate reason for the discharge, one so compelling that it serves to remove an employee from the protection of the Act. This circumstance places a burden on the General Counsel heavier than in the usual dual motive case where a less clearly legitimate "business" reason is weighed against the discriminatory one. As discussed above, the preponderance of the evidence here does not tip the scale in favor of a finding that, but for his protected activity, Sosa would not have been discharged for his picket line misconduct. The General Counsel, not having met his burden, I shall recommend that the complaint be dismissed in its entirety.[10]

CONCLUSIONS OF LAW

1. Roure Bertrand Dupont, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 815, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act in any respect alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[9] The General Counsel alludes to the fact that Respondent has not fired anyone for serious misconduct in the past. However, the record shows there has been no misconduct by any other employee of the nature and kind engaged in by Sosa at the picket line. O'Connell offered the only testimony in this regard and it is clear that there simply is no basis for a relevant comparison.

[10] In reaching this determination, I reject Respondent's argument that a finding by the State of New Jersey Division of Unemployment and Disability Insurance that Sosa was fired for misconduct is binding on the Board. The Board long has held that decisions by state tribunals of this kind are not "in any way controlling." *Cadillac Marine & Boat Co.*, 115 NLRB 107, 108 fn. 1 (1956).